

3-21-87

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 53547-s40A BY REUBEN C.)
PITSCH)

* * * * *

An Oral Argument hearing was held before the Assistant Administrator of the Water Resources Division on Wednesday, March 18, 1987, at the Golden Valley County Courthouse in Ryegate, Montana. Written exceptions to the Proposal for Decision were filed by attorney Thomas M. Ask, on behalf of a number of the Objectors. Written exceptions also were filed by Objectors Eugene and Lois Schaff; Alvin and James Zinne; Larry and Joy Nell Schanz; Roy, Anita and Dan Olson; and Applicant Reuben Pitsch. The DNRC has considered the exceptions and the oral arguments and responds to them as follows.

Most Objectors have taken exception to the Hearing Examiner's conclusions that 1) the proposed use will not interfere unreasonably with permitted uses, and 2) there are unappropriated waters in the source of supply. Conclusions of Law 6 and 8, Proposal for Decision pp. 22-24. At the Oral Argument Hearing, attorney Thomas Ask and others summarized the testimony showing that Big Coulee was heavily appropriated. Mr. Ask, along with other Objectors, also emphasized the testimony of some parties that salinity problems would be aggravated by further appropriations from Big Coulee Creek.

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The Hearing Examiner had considered all of this evidence and limited her Proposal accordingly, granting the Permit only for the spring runoff months of April and May. In reviewing the record, the Department concurs with the Hearing Examiner's conclusion that there was no disagreement with the Applicant's testimony that water was available during this period. Conclusion of Law 8, Proposal at p. 23. Accordingly, the finding that there is unappropriated water during spring runoff is supported by competent substantial evidence.

By limiting the appropriation to April and May, the Hearing Examiner also accommodated the Objectors' concerns about salinity. A review of the record reveals no evidence that salinity problems would be aggravated by the Applicant pumping from Big Coulee Creek during this period. Thus, the record supports the Hearing Examiner's conclusions that there are unappropriated waters in the source of supply in the spring, and that the proposed use will not interfere unreasonably with permitted uses. Since the Examiner's findings are based on competent substantial evidence, they can not be reversed by the Administrator. Section 2-4-621(3), MCA.

Mr. Ask and other Objectors have challenged the reliability of some of the testimony and exhibits, including the Applicant's photographs showing water in Big Coulee Creek (Applicant's Exhibits 4, 5 and 6), the DNRC flow measurements, and the testimony of Dan Wepler. This evidence was not the primary basis of the Hearing Examiner's Proposal, however. Rather, the Proposal incorporated the virtual agreement of all parties that

water was available in the spring. Thus, even if the challenged evidence were disregarded, the Proposal would be supported by competent substantial evidence.

It is not necessary that all appropriators be able to simultaneously divert in order for there to be unappropriated water in a source. Such a requirement would sanction inefficient appropriation, contrary to the Water Use Act policy of encouraging the wise use of the state's water resources. See § 85-2-101(3), MCA. Thus this Permit was properly granted, notwithstanding the argument of the Department of State Lands, and others, that there was not enough flow to cover all the claimed and permitted water rights. In any case, the Hearing Examiner found that not all the rights are presently used. Proposal at p. 22.

Several Objectors expressed concern that the Applicant would not comply with the senior appropriators' call for water. However, the Applicant has stated, both at the hearing and at the oral arguments, that he would respond to such a request from the DNRC field office. Proposal at p. 13. The Department concludes that possible enforcement problems, if any, do not warrant denial of this Permit.

Finally, it was mentioned at oral argument that waters in April and May are not "surplus" every year. The Permit conditions allow for this fact, however, both by declaring the Permit subject to senior appropriations, and by restricting this appropriation to times when the water is not needed by the Delphia-Melstone Project.

For these reasons, the Department finds no reason to modify the Hearing Examiner's Proposal. Accordingly, all the Findings of Fact and Conclusions of Law of the Hearing Examiner's Proposal are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Beneficial Water Use Permit No. 53547-s40A hereby is granted to Reuben C. Pitsch to appropriate 1200 gpm up to 200 acre-feet of water per year from Big Coulee Creek, between April 1 and May 31, inclusive, of each year.

The water will be used for sprinkler irrigation of 324.2 acres: 38 acres in the NW $\frac{1}{4}$ of Section 35, 118 acres in the SW $\frac{1}{4}$ of Section 35, 65 acres in the SE $\frac{1}{4}$ of Section 35, 87.5 acres in the NE $\frac{1}{4}$ of Section 35, 9.2 acres in the NW $\frac{1}{4}$ of Section 36, and 6.5 acres in the SW $\frac{1}{4}$ of Section 36, all in Township 05 North, Range 19 East, Golden Valley County, Montana. The water will be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 05 North, Range 19 East, and taken by pipe to a sump at the site of the pump for the Permittee's center pivot sprinklers.

The priority date for this Permit shall be 12:15 p.m., February 2, 1984.

This Permit is issued subject to the following express terms, restrictions, conditions, and limitations:

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A. The water rights evidenced by the Permit are subject to all prior and existing rights, and to determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Failure to subordinate appropriations made pursuant to this Permit to prior and existing rights may result in modification or revocation of this Permit. Section 85-2-314, MCA.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.


D. At all times when the water is not reasonably required for the specified purpose, or when the Permittee has reason to know that senior appropriators require the water, the Permittee shall allow the waters to remain in the source of supply.

E. The Permittee shall keep a written record of the flow rates, volumes and periods of diversion of all waters diverted pursuant to this Permit, and shall submit such record to the Department of Natural Resources and Conservation upon request.

F. The Permittee shall cease diverting water from Big Coulee Creek when the following two (2) situations occur simultaneously: 1) when the flow in the Musselshell River is

less than what can be beneficially used by the Delphia-Melstone Project, and 2) when water is requested and released from Deadman's Basin Reservoir to satisfy the Delphia-Melstone water demand. If the circumstances are such that only one of the above stated situations occur, the Applicant may use the water for the purpose specified in the Permit, as long as the other conditions placed on the Permit are met.

DONE this 16 day of April, 1987.


LAURENCE SIROKY
Assistant Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620

NOTICE

The Department's Final Order may be appealed in accordance with § 2-4-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Lisa Thornburg, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 6, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER, by the Department on the Application by REUBEN PITTSCH, Application No. 53547-S40A, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

Reuben Pitsch
Ryegate, MT 59074

Thomas M. Ask
ASK AND PRATT
P.O. Box 685
Roundup, MT 59072

Ray W. Olson
Dan J. & Anita Olson
Lavina, MT 59046

Johnny & Helen Schanz
8937 Haffner Court
Juneau, AK 99801

Zinne Brothers
c/o Alvin W. Zinne
Ryegate, MT 59074

Ralph & Mildred Schanz
P.O. Box 217
Ryegate, MT 59074

Eugene & Lois Schaff
79 Ranch Inc.
Big Coulee Route
Ryegate, MT 59074

Agricultural Realty Corp.
c/o Marilyn E. Martin
P.O. Box 230
Nye, MT 59061

Larry & Joy Nell Schanz
Route 1
Ryegate, MT 59074

Douglas H. Parrott
P.O. Box 266
Roundup, MT 59072

Department of State Lands
Ron Roman
Lyle Manley
Capitol Station
Helena, MT 59620
(deadhead mail)

Harry VanDerVoort
Diana Marie VanDerVoort
Ryegate, MT 59074

Estate of Alex Munn
c/o Ethel Munn
402 Quartzite Drive
Lewistown, MT 59457

Coulee Hill Ranch, Inc.
Martin Zinne
Route 1, Box 14
Ryegate, MT 59074

Michael Bryant
P.O. Box 32, Belmont Route
Lavina, MT 59046

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Sterling Sundheim
Water Rights Bureau
DNRC, P.O. Box 894
Glasgow, MT 59230
(inter-departmental mail)

James M. Madden
Legal Counsel
DNRC, 1520 East Sixth Avenue
Helena, MT 59620-2301
(hand delivered)

Sam Rodriguez
Water Rights Bureau
P.O. Box 438
Lewistown, MT 59457
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BY Lisa Thornburg

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 6th day of April, 1987, before me, a Notary Public in and for said state, personally appeared Lisa Thornburg, known to me to be a Legal Secretary of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Donald D. McIntyre
Notary Public for the State of Montana
Residing at HELENA, Montana
My Commission expires 12/15/87

CASE # 53547

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 53547-s40A BY REUBEN C. PITSCH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 22, 1985 in Ryegate, Montana.

Reuben C. Pitsch, the Applicant in this matter, appeared pro se.

Danny Wepler appeared as a witness for the Applicant.

Objectors Roy W., Dan J., and Anita Olson appeared by and through Roy W. Olson and counsel Thomas M. Ask.

Objectors Johnny and Helen Schanz did not appear at the hearing in this matter. See Statement of the Case.

Objectors Zinne Brothers appeared by and through Alvin Zinne.

Objectors Ralph and Mildred M. Schanz appeared personally and by and through counsel Thomas M. Ask.

Objector Douglas H. Parrott appeared personally and through counsel Thomas M. Ask.

Objector Agricultural Realty Corporation appeared by and through Larry Schanz and counsel Thomas M. Ask.

Objectors Larry and Joy Nell Schanz appeared personally by and through counsel Thomas M. Ask.

Objector State of Montana Department of State Lands appeared by and through counsel Lyle Manley.

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Ron Roman, Land Use Specialist for the Montana Department of State Lands, appeared as a witness for Objector State Lands.

Objectors Eugene H. and Lois E. Schaff (79 Ranch, Incorporated) appeared by and through Eugene H. Schaff and counsel Thomas M. Ask.

Objectors Harry and Diana Marie Van Der Voort appeared personally and by and through counsel Thomas M. Ask.

Objector Coulee Hill Ranch, Inc., which filed a late Objection, did not appear at the hearing.

Objector Estate of Alex Munn, Deceased, appeared by and through Michael Bryant, successor in interest to Alex and Ethel Munn, and counsel Thomas M. Ask.

Sterling Sundheim, Agricultural Specialist with the Lewistown Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On February 2, 1984, Applicant Reuben C. Pitsch filed Application for Beneficial Water Use Permit No. 53547-s40A requesting 1200 gallons per minute ("gpm") up to 200 acre-feet of water per year from Big Coulee Creek for sprinkler irrigation of 324.2 acres.¹

¹ The Application in the present matter requests water to supply an irrigation system which has been installed, and which was operated in previous years pursuant to a claimed existing water use right. These water rights were declared abandoned by the Montana Supreme Court. See 79 Ranch, Inc. v. Pitsch; 40 St. Rep. 981, 666 P.2d 215 (1983).

The requested period of use is April 1 to October 1, inclusive, of each year.

Diversion would be made by means of a pump located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 05 North, Range 19 East, and applied by sprinkler irrigation to 38 acres in the NW $\frac{1}{4}$ of Section 35, 118 acres in the SW $\frac{1}{4}$ of Section 35, 65 acres in the SE $\frac{1}{4}$ of Section 35, 87.5 acres in the NE $\frac{1}{4}$ of Section 35, 9.2 acres in the NW $\frac{1}{4}$ of Section 36, and 6.5 acres in the SW $\frac{1}{4}$ of Section 36, all in Township 05 North, Range 19 East, Golden Valley County, Montana.

The pertinent portions of the Application were published in the Times-Clarion, a newspaper of general circulation in the area of the source, on March 22 and March 29, 1984.

Eleven timely objections were filed to the Application. Coulee Hill Ranch, Inc., filed a late Objection, stating that it would withdraw its Objection if its own permit application (No. 27844-s40A) was acted on and approved prior to action on Mr. Pitsch's Application. On January 21, 1985, the Department issued a Final Order, granting Beneficial Water Use Permit No. 27844-s40A to Coulee Hill Ranch, Inc., with a priority date of June 2, 1980.

Ten of the eleven timely Objectors objected to the present Application by Mr. Pitsch on the basis that there are no unappropriated waters in Big Coulee Creek, alleging generally that there is insufficient water to allow further uses. Douglas Parrott objected on the basis that Big Coulee Creek is a "major" tributary to the Musselshell River upstream from Mr. Parrott's point of diversion on the river, and therefore any further

appropriations from Big Coulee Creek would exacerbate the water shortage problems on the Musselshell.

Johnny and Helen Schanz and Ralph and Mildred Schanz alleged that the proposed appropriation would not leave sufficient water in the creek for stockwatering, with Ralph and Mildred Schanz expressing concern that the quality as well as the quantity would diminish. The Schanzes and the Zinne Brothers alleged that the pumping which the Applicant has done previously (pursuant to a claimed use right) caused harm to downstream appropriators. The Zinnes additionally alleged that it is not possible to get timely enforcement or relief when they are harmed by the Applicant's pumping.

Larry and Joy Nell Schanz alleged that water is available on Big Coulee Creek only during the spring, when it is not needed because the soil already is saturated. Referencing water sampling that they had done at three locations in the area, the Schanzes also stated that the tributaries to Big Coulee Creek are very saline, and that the water from the main branch is needed to dilute the salinity, and therefore should not be further reduced in volume.

Eugene and Lois Schaff, and Harry and Diana Marie Van Der Voort also included in their Objections references to the Supreme Court decision in 79 Ranch, Inc. v. Pitsch 40 St. Rep. 981, 666 P.2d (1983), and the district court judgment and decree on remand (Cause No. 1724 in the District Court of the Fourteenth Judicial District, Golden Valley County, August 22, 1983).

On June 7, 1984, Sterling Sundheim mailed a copy of his June 4, 1984 Field Report on Application No. 53547-s40A to all parties of record.

On November 5, 1985, Helen Schanz notified the Department that she would be unable to attend the hearing in this matter due to the death of her husband, but that she continued her objection to Mr. Pitsch's Application on the basis that the proposed appropriation would adversely affect her water rights.

The hearing in this matter was completed on November 22, 1985, and the record was closed at the end of the hearing.

EXHIBITS

The Applicant offered six exhibits for inclusion in the record in this matter:

Applicant's Exhibits 1, 2, and 3 are photographs of the Applicant's sprinkler system, taken by the Applicant on November 21, 1985. Exhibits 1 and 2 show portions of the wheel line, while Exhibit 3 shows the pump and electrical connections for the sprinkler system.

Applicant's Exhibits 4, 5, and 6 are photographs taken by the Applicant on July 5, 1978, showing the flow of Big Coulee Creek at various locations (marked on the back of the photographs). Exhibit 4 shows Big Coulee Creek north of Section 36, Township 5 North, Range 19 East, "by County Road"; Exhibit 5 was taken looking north on county road in Section 35; and Exhibit 6 was taken north of Eva Schanz's place where the county road crosses Big Coulee Creek.

Applicant's Exhibits 1 through 6 were accepted into the record without objection.

The Objectors offered sixteen exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 consists of seven photocopied pages; one page of signatures and six pages of correspondence concerning a petition by "users of water in the source of supply" to preclude new appropriations from the Musselshell River (initiation of rule-making proceedings in accordance with § 85-2-319, MCA).

Objectors' Exhibit 2 is a photocopy of a computer printout of claimed water rights, taken from the temporary preliminary decree on the Musselshell River above Roundup (Basin 40A). The printout is indexed by source name, and covers the use rights claimed on the source Big Coulee Creek (pages 4 through 16 of the index, dated April 27, 1985).

Objectors' Exhibit 3 consists of six photographs taken by Eugene Schaff at the pump site for 79 Ranch, Inc. The photographs, taken on July 6, 1984, June 20, 1985, and October 19, 1985 (as marked on the back of the respective photos) show Big Coulee Creek at times when 79 Ranch, Inc. was not irrigating.

Objectors' Exhibit 4 is a photocopy of the results of analysis made on three samples of water taken by Larry Schanz, delivered to Northern Testing Laboratories in Billings on April 21, 1983.

Objectors' Exhibit 5 is a photocopy of a Water Right Transfer Certificate, indicating that Michael and Jacqueline Bryant are

successors in interest to the Estate of Alex N. Munn (Objector) for purposes of the specified water rights which have been transferred.

Objectors' Exhibit 6 is a photocopy of a computer printout of claimed water rights, taken from the temporary preliminary decree on the Musselshell River above Roundup (Basin 40A). The printout is indexed by owner name, and shows the rights claimed by Douglas H. and Shirley A. Parrott. (Page 95 of the index of claims by owner, dated April 27, 1985).

Objectors' Exhibit 6-B is a two-page, handwritten discussion of Alvin Zinne's concerns with the Applicant's proposed appropriation. Mr. Zinne read the material verbatim into the record at the hearing.

Objectors Exhibit 7 is a photocopy of a hand-drawn map showing the intended places of use for Beneficial water Use Permit No. 27942-s40A, issued to the Zinne Brothers.

Objectors' Exhibit 8 is a photocopy of a hand-drawn map showing the intended places of use for Beneficial Water Use Permit No. 27941-s40A, issued to the Zinne Brothers.

Objectors Exhibit 8-A is a photocopy of a map, with the intended places of use for Beneficial Water Use Permit No. 50642-s40A, issued to the Zinne Brothers, marked in on the map.

Objectors' Exhibit 9 is a photocopy of Provisional Permit No. 27941-s40A, granting 1625 gpm up to 81 acre-feet per year to the Zinne Brothers. (Priority date May 29, 1980.)

Objectors' Exhibit 10 is a photocopy of Provisional Permit No. 27942-s40A, granting 1500 gpm up to 50 acre-feet per year to the Zinne Brothers. (Priority date May 29, 1980.)

Objectors' Exhibit 11 is a photocopy of Provisional Permit No. 50642-s40A, granting 720 gpm up to 90 acre-feet per year to the Zinne Brothers. (Priority date April 14, 1982.)

Objectors' Exhibit 12 is a photocopied three-page document "resource development description" which consists of a description of an irrigation project (No. 283) on State lands leased by Larry and Joy Nell Schanz. The description, dated September 28, 1984, summarizes the project, the lease terms, and the impact on revenue from the lands.

Objectors' Exhibit 13 is a photocopy of a Statement of Claim for Existing Water Right No. 136029-40A, claiming stockwater use rights for State land on Big Coulee Creek.

Objectors' Exhibit 14 is a photocopy of a map of the Big Coulee Creek drainage (a composite of two USGS quad maps) marked with the Applicant's proposed point of diversion and place of use (labelled and marked in yellow), and the places of use for Permits and SB76 Claims made by the Montana Department of State Lands (labelled and marked in blue).

Objectors' Exhibits 2 through 14 were accepted into the record without objection. The Applicant did not object to Objectors' Exhibit 1 at the time it was introduced, but later in the hearing objected to it on the basis that the petition is dated later than the Applicant's permit application.

As discussed below in Preliminary Matters, any action taken in the present matter will not be based on the existence or status of the proposed rule adoption on the Musselshell River. Therefore, Objectors' Exhibit 1 is relevant for the purpose of substantiating testimony about appropriators' concerns in regard to water availability in the Musselshell River basin, but is admitted into the record only for this limited purpose. The Applicant's objection to Objectors' Exhibit 1 hereby is overruled, since the date of the petition is irrelevant to the purpose for which the exhibit has been accepted for the record.

The Department did not offer any exhibits for inclusion in the record in this matter. A motion had been made to have the Department's entire file included in this matter. Since the parties in this matter had a chance to review the file, and no objections were made to its inclusion, the motion was granted. Therefore, Sterling Sundheim's June 4, 1984 Field Report, as part of the file, is part of the record in this matter.

PRELIMINARY MATTERS

Thomas Ask, counsel for several of the Objectors, made a motion at the November 22 hearing that the hearing in this matter be continued, or alternatively that the decision be delayed, pending the outcome of a petition filed with the Department of Natural Resources and Conservation asking for the adoption of rules to preclude water use permit applications on the Musselshell River. (See Objectors' Exhibit 1.)

The Hearing Examiner denied the motion for continuance and took the motion to delay the decision under advisement. The motion to delay hereby is denied; no basis can be found for granting such a motion.

There is disagreement between the Department and Musselshell River petitioners as to whether the petition in question includes tributaries of the Musselshell River (see Findings of Fact 14 and 23), since the tributaries were not included in the original petition signed by users of Musselshell River water. (See Objectors' Exhibit 1.) However, even assuming arguendo that the petition may cover Big Coulee Creek, there is no justifiable basis for the Department to withhold action on the Applicant's Application in the interim before a decision is made regarding the petition.

A review of the relevant statute, MCA § 85-2-319 (1985), shows that the statute does not state directly or indirectly that action on pending applications for permits will be suspended during the petitioning and rule-making process. The Department is under no directive to cease its processing of permit applications on sources which are being reviewed for closure.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 53547-s40A was duly filed with the Department of Natural Resources and Conservation on February 2, 1984, at 12:15 p.m.

3. The pertinent portions of the Application were published in the Times-Clarion, a newspaper of general circulation in the area of the source, on March 22 and 29, 1984.

4. The source of the proposed appropriation is Big Coulee Creek, a tributary of the Musselshell River, in Golden Valley County, Montana.

5. The Applicant is applying for water to run a sprinkler irrigation system which is already in place. He testified that a tube carries water from Big Coulee Creek into a sump, with the pump sitting above the sump. Water is pumped from there into the irrigation system. The system, which includes two center pivot sprinkler systems, irrigates 324.2 acres: 38 acres in the NW $\frac{1}{4}$ of Section 35, 118 acres in the SW $\frac{1}{4}$ of Section 35, 65 acres in the SE $\frac{1}{4}$ of Section 35, 87.5 acres in the NE $\frac{1}{4}$ of Section 35, 9.2 acres in the NW $\frac{1}{4}$ of Section 36, and 6.5 acres in the SW $\frac{1}{4}$ of Section 36, all in Township 05 North, Range 19 East, Golden Valley County, Montana.

6. The pump which is currently in place has a 1200 gpm capacity, which is the flow rate for which the Applicant is applying. To achieve the requested volume of 200 acre-feet per

year, the Applicant would pump for slightly more than 905 hours (37.71 days). The Applicant testified that this amount of water would "tide over" one crop of grain and one to two cuttings of hay per year. He stated that although Sterling Sundheim (Lewistown Field Office) said 600 acre-feet would be required for the proposed irrigation, it does not take that much water when irrigating the bottom of the coulee.

7. The Applicant testified that there is a "good flow" in Big Coulee Creek during the early part of the year in normal years. He stated that water usually is available from spring to July, based on his experience with the creek since he purchased the property in 1975; that spring runoff occurs sometime after the middle of February, usually in the latter part of March, with high flows continuing for three to four weeks and then tapering off. Mr. Pitsch stated that high flow is usually over by the first part of June, except for times of rain runoff; he stated that he would expect to do his 38 days of irrigating in the latter part of April and in May.

The Applicant estimated that seven out of ten years have "not bad" flows. In reference to photographs he took of Big Coulee Creek in 1978 (see Applicant's Exhibits 4, 5, and 6), Mr. Pitsch testified that the flow shown in the photographs is "better" than the usual flow, but does show that there are times when excess flow is available.

Mr. Pitsch stated that he believes that downstream users don't necessarily get water even if he allows the water past his

point of diversion, since the creek gains and loses, and since the amount of flow he is requesting "doesn't mean that much in that length of stream."

8. Mr. Pitsch testified that he would not irrigate if flow got low, because it would affect senior appropriators, but that a telephone call from downstream users would not be sufficient for him to cease diverting. He said that he would respond to such a request from the Department of Natural Resources and Conservation Field Office.

9. Dan Wepler testified that he lives upstream from the Applicant, at the "head" of the creek (the junction with the North Fork of Coulee Creek). He stated that he is familiar with Big Coulee Creek "down past the Zinnes" and again at the highway to Lavina, and that flows vary up and down the creek. He stated that a lot of springs come up in the creek, most of the recharge coming in above the Applicant, but that flow disappears and reappears downstream, also.

Mr. Wepler testified that he believes Big Coulee Creek needs storage to provide a dependable water supply, but that no one has been interested in developing storage or helping to expand the reservoir which Mr. Wepler's father built on the North Fork of the creek, due to the expense which would be involved.

Mr. Wepler stated that he thinks sprinkler irrigation is also beneficial in the area because it avoids alkali buildup.

Mr. Wepler testified that he thinks the spring runoff can cover all users, but only if used efficiently.

10. Objector Eugene Schaff stated that he has a ranch (the 79 Ranch) across the road from the Applicant, and has lived there for 53 years. He testified that the Applicant's use of water affects other users, except during high water in the spring, and that the flood season usually occurs when the weather is still too cold to permit irrigation.

Mr. Schaff testified that the 79 Ranch is always affected when the Applicant is pumping, and that there is a four-hour lag time between the time the Applicant shuts off and the time water reaches Mr. Schaff. He stated that there are times when there is not enough water in Big Coulee Creek for the senior appropriators, even if the Applicant is not pumping. In response to questioning, Mr. Schaff stated that the times when 79 Ranch is water short vary, depending on when the runoff occurs.

11. Objector Harry Van Der Voort stated that he lived on Big Coulee Creek from 1941 through 1979, at a location about 18 air miles downstream from the Applicant (approximately three times that distance by creek miles). He testified that he doesn't think that any water is available in Big Coulee Creek; that it is normal for the creek to be too dry to irrigate out of at his place after the middle of June. Mr. Van Der Voort testified that they lost the flow in August in 1978, but that they have lost it as early as May in one year, and had to move their cows since not even stockwater was left in the creek.

12. Objector Roy Olson testified that he lives 20 miles downstream from the Applicant, and has irrigated since 1973. He

estimated that there has been "adequate water" in possibly five out of the last ten years. Mr. Olson testified that he does not think there is enough water in the creek even for current filings on water rights.

13. Mike Bryant, successor in interest to Objector Estate of Alex Munn, testified that Big Coulee Creek dried up in 1985. He stated that the Soil Conservation Service had looked at the soil on his place, and told him it was highly saline and would not grow alfalfa.

Mr. Bryant is located approximately 15 air miles downstream from the Applicant.

14. Objector Douglas Parrott testified that he claims water out of the Musselshell River, to which Big Coulee Creek is tributary. He stated that the Musselshell River has had "inadequate" water the last three years, and that any reduction of water in tributaries to the river will reduce the flow in the Musselshell. He testified that the Musselshell is not water short during spring runoff, but that the early runoff cannot be utilized because it is impossible to dispose of salinity, flushed from the fields by irrigation, during flood stage.

Mr. Parrott stated that he is a petitioner on the Musselshell River petition, and that the petitioners decided the petition also would include all the tributaries of the Musselshell River, which would impose any restrictions which may be adopted on Big Coulee Creek as well as on the main stem of the Musselshell.

Mr. Parrott testified that he believes the permit conditions which previously have been placed on water users from the Musselshell River and its tributaries are inadequate, since they depend on water measurements taken downstream from the point at which Deadman's Basin water enters the Musselshell. Mr. Parrott stated that he also sees a problem with the conditions and with permits due to the Department of Natural Resources and Conservation's apparent inability to enforce them.

15. Objector Alvin Zinne testified that he has been on Big Coulee Creek for 49 years, and that he thinks the Applicant's proposed appropriation would affect domestic and livestock water at critical periods. He stated that the Applicant caused adverse effect to other users when he appropriated water previously (1976 through 1982), and that the water quality at the Zinnes (about three air miles downstream from the Applicant) "goes to alkali" when the Applicant is pumping.

Mr. Zinne estimated that five out of ten years there might be as much water as shown in Applicant's Exhibits 4, 5, and 6, that three years out of ten the flow was not as good, and that at least one year out of ten is dry.

16. Alvin Zinne testified that the Zinne brothers have been granted three permits on Big Coulee Creek for three different locations (priority dates of May 29, 1980 for two, and April 14, 1982 for the other), but that they had not used any of the permits as of the time of the hearing due to salinity of water and to the 1985 water shortage.

He stated that they will not be taking "anything like" the amounts granted in the permits (the permits total 3845 gpm up to 221 acre-feet per year), but may use about 700 gpm. In response to questioning, he stated that he probably would not use all of the permit water even if it was available, since he couldn't foresee buying the equipment for utilizing it. (See Objectors' Exhibits 9, 10, and 11.)

17. Objector Larry Schanz testified that he has lived on Big Coulee Creek about 30 years, at a location approximately four air miles below the Applicant's point of diversion. He stated that he runs about 70 head of stock, and also irrigates pursuant to a permit which is held by the Department of State Lands for the acreage, and in which both the State and the Schanzes have invested money in the irrigation.

Mr. Schanz testified that, in his experience, the flow in the creek is high in runoff, with May and June usually being wet months except for the last three years, then becoming low after June. He characterized Big Coulee Creek as being "water short" from July 1 on through the season.

Mr. Schanz stated that there is a problem with salinity in the area, and that many of the tributaries of Big Coulee Creek are saline to the point where cattle will not drink from them. He stated that the water in Big Coulee is relatively fresh, and is needed to dilute the salinity caused by tributaries; that if more fresh water is removed, as by the Applicant's proposed appropriation, then the saline problem will worsen. See Objectors' Exhibit 4.)

18. Ralph Schanz, testifying on behalf of Larry Schanz, stated that he has been familiar with Big Coulee Creek for many years, and that he does not think there is even sufficient water for the current users. He added that during most summers there is only enough water for stockwatering; that many persons cannot irrigate.

19. Ron Roman, testifying for the Montana Department of State Lands (hereafter, "State Lands"), stated that State Lands objects to the proposed appropriation because of possible adverse effects to School Trust lands and to claimed water use rights and Beneficial Water Use Permits which State Lands holds in its name. (See Objectors' Exhibit 14.)

Objector Larry Schanz is lessee of 22 acres of School Trust land on which the State (and lessee) have invested money to develop irrigation and improve the lands. (Testimony of Ron Roman.) Mr. Roman testified that the state investment was made in order to improve the School Trust lands and increase revenue from the lands. He stated that the revenue from the acreage was \$192.00 per year before the improvements, and with the improvements is now \$1,600.00 per year. Improvement of the land and increased revenue will not be realized by the State if water is not available for use on the lands, according to Mr. Roman.

20. Mr. Roman testified that there appears to be inadequate water in Big Coulee Creek to meet all of the present needs. Referring to Sterling Sundheim's June 4, 1984 Field Report, Mr. Roman noted that at the time of Mr. Sundheim's flow measurements (May 17, 1984), supposedly during the high flow

period in Big Coulee Creek, there was not enough water to cover all the claimed water use rights plus the two Permits being used at the time (one of which was a State Lands permit use of 132 gpm): Mr. Roman noted that current uses did not include over 4700 gpm of permits which had not been put to use by then (Permits Nos. 31403 and 27147 granted to Warren Sullivan, Nos. 27941, 27942, and 50642 granted to the Zinne Brothers, and No. 27844 granted to Coulee Hill Ranch).

21. Sterling Sundheim, Agricultural Specialist with the Lewistown Water Rights Bureau Field Office, appeared as staff expert witness for the Department. Mr. Sundheim stated that the only flow records on Big Coulee Creek, taken by the USGS in 1957 through 1971, are influenced by springs above the gaging site.

He testified that he took two flow measurements on Big Coulee Creek at the time of his field trip on May 17, 1984. One measurement, taken just below the Applicant's location, showed a flow of 12.48 cfs (5602 gpm), while the flow measurement taken downstream from the Applicant about 1 3/4 miles above Objector Van Der Voort's irrigation showed a flow of 14.488 cfs (6502 gpm). Mr. Sundheim estimated in his report that the flow was normal or below normal for the time of year (see June 4, 1986 Field Report), but noted at the hearing that Mr. Van Der Voort, who had told him at the time of the field visit that the flow was below normal, testified at the hearing that the flow had been above normal instead.

22. Mr. Sundheim stated that the flow measurements indicate that, if all permit and claimed water uses were being made at the

same time, there is not water available for the Applicant. If not everyone diverts at the same time, the Applicant may be able to divert, but only during high water in April, May, and possibly June. He stated that flows drop off dramatically in July and August.

Mr. Sundheim added that there may be other times during some years when water would be available for the proposed appropriation, but that these times may not occur very often. He estimated that water probably is available in July and August in less than two years out of ten.

He also noted in his field report that the Permits and claimed uses on Big Coulee Creek probably would not all be used simultaneously, and that at least two of the Permits (Nos. 27941 and 27942, granted to the Zinne Brothers) would be filled in a matter of a few days of irrigation at the permit flow rate. (See June 4, 1984 Field Report, page 5.)

23. Mr. Sundheim's field report states that Big Coulee Creek contributes water to the Musselshell River most (if not all) of the time, and Mr. Sundheim testified that Big Coulee Creek is one of the main Musselshell tributaries in that vicinity. He testified that his assumption is that the water the Applicant proposes to divert normally would reach the Musselshell River. Therefore, he stated, the Lewistown Field Office has suggested that any permit granted in this matter should be conditioned to protect the water rights on the Musselshell River. (See June 4, 1984 Field Report, pages 6 and 7 for the suggested permit condition.)

In response to a question concerning the petition for rule adoption on the Musselshell River, Mr. Sundheim stated that he does not think that the petitioners can add tributaries to the petition at this point in the process, as Objector Douglas Parrott stated that the petitioners intend to do. (See Finding of Fact 14.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;

- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. Those parties who failed to appear at the hearing in this matter, in person or by representation, are in default.

Administrative Rule of Montana 36.12.208.

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985), Sayre v. Johnson, 33 Mont. 15, 18 P. 389 (1905).

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

8. The record in this matter shows that there are unappropriated waters in the source of supply. There is substantial credible evidence to indicate that the amount of water the Applicant seeks to appropriate is available at times when the water can be put to the use proposed by the Applicant. (See Findings of Fact 6 and 7.)

Although a review of the recorded water use rights on Big Coulee Creek shows the creek to be overappropriated, at least on paper (see Findings of Fact 20 and 21), testimony indicates that not all of the rights are being used. (See Finding of Fact 16.)

In addition, testimony at the hearing and previous Findings by the Department² indicate that water is available for appropriation during spring runoff in Big Coulee Creek (see Findings of Fact 7, 9, 17, and 21): there was no disagreement expressed by any of the parties with the Applicant's assertion that water is available in Big Coulee Creek during spring runoff, although there was some disagreement as to whether or not the Applicant could utilize water during the time of year when the runoff occurs, see Finding of Fact 10. However, the Applicant is the party best able to ascertain whether he is able to utilize water at this time of year: if he is unable to so use the water, the right will never be perfected, and may be modified or revoked at the verification stage.

This period of runoff was characterized by the Applicant as beginning in February or March, and over by the first part of June. (See Finding of Fact 7.) No other party proffered testimony as to when spring runoff begins in Big Coulee Creek, although Mr. Van Der Voort testified that the creek is low by the middle of June (Finding of Fact 11), while Larry Schanz characterized Big Coulee Creek as being "water short" after July 1 (Finding of Fact 17).

² See In the Matter of the Application for Beneficial Water Use Permit No. 50642-s40A by Zinne Bros., May 2, 1985 Final Order; In the Matter of the Application for Beneficial Water Use Permit No. 27844-s40A by Coulee Hill Ranch; In the Matter of the Application for Beneficial Water Use Permit No. 22465-s40A by Minnie L. Zinne and Application for Beneficial Water Use Permits No. 27941-s40A and 27942-s40A by Zinne Bros.

Nothing in the record suggests that the Objectors' other concerns, such as salinity or delays in receiving water (see Statement of the Case, Findings of Fact 10 and 17), are a problem during the period of spring runoff.

9. There is conflicting testimony as to whether water is available for appropriation in June. (See Findings of Fact 11 and 17.) The limited evidence on the record indicates that high water from spring runoff ends in May, with any high runoff subsequent to that time being due to rain. See Finding of Fact 7. Neither the Applicant nor the other parties indicated whether or not runoffs caused by rain, as opposed to the spring snowmelt, provide sufficient flow in Big Coulee Creek that water is available for appropriation at those times. In addition, the Applicant indicated that he expected to irrigate during April and May, but did not make reference to irrigating in June. Therefore, the Applicant has not carried his burden of proof on the issues of whether water is available, and would be put to beneficial use, in June.

10. There is no evidence in the record to indicate that water is available in the months of July, August, and September of the Applicant's proposed period of use.

11. The record indicates that the Musselshell River normally is not water short during spring runoff. (See Finding of Fact 14.) However, Big Coulee Creek is a main tributary of the Musselshell River in the area, and any permits granted from Big Coulee must be conditioned to protect senior uses from the

Musselshell. (See Finding of Fact 23.) Note has been taken of the possibility that the permit conditions normally placed on permits granted on Big Coulee Creek (see Footnote 2), based on flows taken near Roundup, Montana, are inaccurate. (See Finding of Fact 14.) Therefore, an alternative condition is included in the Proposed Order in this matter.

12. Big Coulee Creek apparently gains and loses flow at various points along its length. (See Findings of Fact 7 and 9.) However, Mr. Pitsch did not provide flow data or other evidence to substantiate his claim that water which he allows past his point of diversion may not reach downstream appropriators. Therefore, Mr. Pitsch has not been granted a period of appropriation extending beyond the time when water is available above and beyond existing uses. Further, Mr. Pitsch may not excuse a refusal to respond to a senior appropriator's call on the basis that the water might not make it down to the senior user, since he has not provided evidence that such a call would be futile.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial water Use Permit No. 53547-s40A hereby is granted to Reuben C. Pitsch to

appropriate 1200 gpm up to 200 acre-feet of water per year from Big Coulee Creek, between April 1 and May 31, inclusive, of each year.

The water will be used for sprinkler irrigation of 324.2 acres: 38 acres in the NW $\frac{1}{4}$ of Section 35, 118 acres in the SW $\frac{1}{4}$ of Section 35, 65 acres in the SE $\frac{1}{4}$ of Section 35, 87.5 acres in the NE $\frac{1}{4}$ of Section 35, 9.2 acres in the NW $\frac{1}{4}$ of Section 36, and 6.5 acres in the SW $\frac{1}{4}$ of Section 36, all in Township 05 North, Range 19 East, Golden Valley County, Montana. The water will be diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 05 North, Range 19 East, and taken by pipe to a sump at the site of the pump for the Permittee's center pivot sprinklers.

The priority date for this Permit shall be 12:15 p.m., February 2, 1984.

This Permit is issued subject to the following express terms, restrictions, conditions, and limitations:

A. The water rights evidenced by the Permit are subject to all prior and existing rights, and to determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Failure to subordinate appropriations made pursuant to this Permit to prior and existing rights may result in modification or revocation of this Permit. MCA § 85-2-314 (1985).

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

D. At all times when the water is not reasonably required for the specified purpose, or when the Permittee has reason to know that senior appropriators require the water, the Permittee shall allow the waters to remain in the source of supply.

E. The Permittee shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to this Permit, and shall submit such record to the Department of Natural Resources and Conservation upon request.

F. The Permittee shall cease diverting water from the Musselshell River when the following two (2) situations occur simultaneously: (1) when the flow in the Musselshell River is less than what can be beneficially used by the Delphia-Melstone Project and (2) when water is requested and released from Deadman's Basin Reservoir to satisfy the Delphia-Melstone water demand. If the circumstances are such that only one of the above

stated situations occur, the Applicant may use the water for the purpose specified in the Permit, as long as the other conditions placed on the Permit are met.

DONE this 19th day of August, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and

oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

CASE # 53547

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 20, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by Reuben C. Pitsch, Application No. 53547-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Reuben C. Pitsch, Ryegate, MT 59074
2. Roy W., Dan J. & Anita Olson, Lavina, MT 59046
3. Johnny & Helen Schanz, 8937 Haffner Ct., Juneau, AK 99801
4. Zinne Brothers, % Alvin W. Zinne, Ryegate, MT 59074
5. Ralph & Mildred M. Schanz, Box 217, Ryegate, MT 59074
6. Douglas H. Parrott, P.O. Box 266, Roundup, MT 59072
7. Agricultural Realty Corp., % Kathryn E. Martin, Rt. 2, Box 230, Nye, MT 59061
8. Larry & Joy Nell Schanz, Rt. 1, Ryegate, MT 59074
9. State of Montana, Dept. of State Lands, Ronald J. Roman, Capitol Station, Helena, MT 59620
10. State of Montana, Dept. of State Lands, Lyle Manley, Attorney, Capitol Station, Helena, MT 59620
11. Eugene H. & Lois E. Schaff, 79 Ranch Inc., Big Coulee Rt., Ryegate, MT 59074
12. Harry & Diana Marie Vandervoort, Ryegate, MT 59074
13. Estate of Alex Munn, Deceased, % Ethel Munn, 402 Quartzite Dr., Lewistown, MT 59457
14. Coulee Hill Ranch, Inc., Rt. 1, Box 14, Ryegate, MT 59074
15. Thomas M. Ask, Attorney, P.O. Box 685, Roundup, MT 59072
16. Sam Rodriguez, Manager, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
17. Peggy A. Elting, Hearing Examiner (hand-deliver)
18. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

CASE # 53547

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 20th day of August, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T.J. Reynolds
Notary Public for the State of Montana
Residing at _____, Montana
My Commission expires _____

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My Commission Expires July 23, 1989

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